

United States District Court

For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DATAMIZE, LLC, a Wyoming limited liability corporation,

NO C 02-5693 VRW

Plaintiff,

ORDER

v

PLUMTREE SOFTWARE, INC, a Delaware corporation,

Defendant.

Plaintiff Datamize, LLC (Datamize), alleges that defendant Plumtree Software, Inc's (Plumtree) corporate portal software infringes a Datamize patent. In response, Plumtree seeks summary judgment of invalidity of the Datamize patent for indefiniteness. Doc # 51. Plumtree argues that use of the term "aesthetically pleasing" in the Datamize patent's sole independent claim runs afoul of 35 USC § 112 ¶ 2 and renders the patent invalid. Because the meaning of claim terms is a question of law for the court and because a patent must particularly point out and distinctly claim the invention, "aesthetically pleasing" is too indefinite a term by which to

1 claim an invention. Plumtree's motion for summary judgment (Doc  
2 # 51) is GRANTED.

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8 Defendant Plumtree is a developer, marketer and  
9 licensor of "corporate portal software." Decl Michael B Levin  
10 (Levin Decl; Doc # 52) at 2 ¶ 8, Exh G at 2. Corporate portal  
11 software is web-based software that brings together a variety of  
12 personalized and integrated corporate information, such as  
13 sales, marketing and engineering information. See id at 2 ¶ 9,  
14 Exh H at 4. The software can be used to develop corporate  
15 intranet sites that allow employees to access, search and manage  
16 corporate information. See id at 2 ¶ 8, Exh G at 4.

17 Plaintiff Datamize alleges that Plumtree's corporate  
18 portal software infringes United States Patent No 6,014,137 (the  
19 '137 patent), which Datamize now owns. See Ans & Counterclaim  
20 (Doc # 11) at 2 ¶¶ 6-9. The '137 patent was originally obtained  
21 by Kevin Burns as the result of a provisional application filed  
22 on February 27, 1996. See generally Patent (Levin Decl at 1 ¶  
23 2, Exh A). Burns had invented an authoring system to be used in  
24 developing and maintaining user interface screens on kiosks or  
25 computers. Id at 3:25-28. The patent's claims describe an  
26 "electronic kiosk system having a plurality of interactive  
27 electronics kiosks" and a method for "defining custom interface  
28 screens customized for individual kiosks." Id at 20:37-38,

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1 20:40. The system allows quick and easy customization of  
2 interfaces across large numbers of kiosks, with large amounts of  
3 information potentially available to each individual kiosk. Id  
4 at 3:28-38.

5 The '137 patent acknowledged the existence of prior art  
6 consisting of commercial authoring software used to create and  
7 modify computer interface screens; but this software allegedly  
8 required substantial effort to create custom screens. Id at  
9 2:18-20, 3:5-7. The '137 patent's invention allegedly improves  
10 upon the prior art through a kiosk authoring tool that provides  
11 the individual creating the kiosk system (the system author)  
12 with a "limited range of choices" for customizing the kiosks'  
13 interface screens. Id at 3:52-57. The system author will only  
14 be presented with choices that the authoring tool has found to  
15 be aesthetic and functional. Id at 3:52-66. This enables  
16 system authors with limited computer programming experience to  
17 set up kiosk interface screens with ease. Id at 3:48-52.

18 The '137 patent contains only one independent claim,  
19 describing a method comprised in part of the following steps:

20 [b] providing a plurality of pre-defined  
21 interface screen element types, each element  
22 type defining a form of element available for  
23 presentation on said custom interface screens,  
24 wherein each said element type permits limited  
variation in its on-screen characteristics in  
conformity with a desired uniform and  
aesthetically pleasing look and feel for said  
interface screens on all kiosks of said kiosk  
system,

25 each element type having a plurality of  
26 attributes associated therewith, wherein  
27 each said element type and its associated  
28 attributes are subject to pre-defined con-  
straints providing element characteristics  
in conformance with said uniform and  
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2            /  
3            aesthetically pleasing look and feel for  
4            said interface screens, and  
5            \* \* \*  
6            [d] assigning values to the attributes assoc-  
7            iated with each of said selected elements con-  
8            sistent with said pre-defined constraints,  
9            whereby the aggregate layout of said plurality  
10          of selected elements on said interface screen  
11          under construction will be aesthetically pleasing  
12          and functionally operable for effective delivery  
13          of information to a kiosk user;

14            \* \* \* .  
15          Id at 20:37-21:23 (emphasis added). The remaining claims in the  
16          '137 patent appear to be dependent on this first claim. See id  
17          at 21:24-22:41; Mot Sum J (Doc # 51) at 5:3-5; Opp Mot Sum J  
18          (Doc # 60) at 11:1-2.

19          Apparently, the patent examiner for the '137 patent  
20          never commented upon the use of the words "aesthetically  
21          pleasing" in that patent. See Opp Mot Sum J at 6:6-7. Prior to  
22          the issuance of the '137 patent, however, Datamize filed a  
23          continuation application, which eventually resulted in the  
24          issuance of United States Patent No 6,460,040 (the '040 patent),  
25          which is not asserted in the present action. See Levin Decl at  
26          2 ¶ 4, Exh C. The '040 patent contained a claim with language  
27          virtually identical to the independent claim in the '137 patent;  
28          specifically, the claim in the '040 patent contained the words  
29          "aesthetically pleasing" several times. See Levin Decl at 2 ¶  
30          4, Exh C at 6-7. The examiner for the '040 patent rejected that  
31          language and stated that "[a]esthetically pleasing is an  
32          individual conclusion and is highly subjective." Id at 2 ¶ 5,  
33          Exh D at 2. Datamize responded to the examiner by listing its

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1 reasons for including the language and pointing out that the  
2 examiner for the '137 patent had allowed the language in  
3 connection with the '137 patent. Id at 2 ¶ 6, Exh E at 2-3.  
4 Shortly afterward, the patent examiner contacted the prosecuting  
5 attorney to inform him that he would allow the claims if the  
6 contested language were deleted. Id at 2 ¶ 7, Exh F at 1.  
7 Datamize agreed to do so, apparently on the basis that this  
8 change would actually broaden the claims, would reflect the  
9 unimportance of the "aesthetically pleasing" language and would  
10 expedite the patent's issuance. See id; Opp Mot Sum J at 8:13-  
11 23.

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13 B  
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15 The dispute presented in this case actually commenced  
16 in the United States District Court for the District of Montana.  
17 In May of 2002, Datamize brought suit in that court, alleging  
18 that Plumtree had infringed the '137 patent. 10/6/03 Ord (Doc #  
19 32) at 2:3-7. On December 4, 2002, Plumtree filed an action in  
20 the Northern District of California for declaratory judgment.  
21 Doc # 1. The Montana action was dismissed for lack of personal  
22 jurisdiction on July 8, 2003. 10/6/03 Ord at 2:9-15, 2:25-28.  
23 Subsequently, on July 17, 2003, Datamize filed its answer in  
24 Plumtree's Northern District action and counterclaimed for  
25 patent infringement. Doc # 11. A claims construction hearing  
date was set for September 1, 2004. Doc # 23.

27 On October 6, 2003, the court granted Datamize's motion  
28 for realignment (Doc # 18), ordering that Datamize be designated

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1 the plaintiff and Plumtree be designated the defendant. 10/6/03  
2 Ord at 12:10-15. Then, on March 31, 2004, Plumtree filed the  
3 instant motion for summary judgment on the issue whether the  
4 '137 patent is invalid. Doc # 51. Plumtree contends that the  
5 '137 patent is invalid because the term "aesthetically  
6 pleasing," which appears three times in the patent's sole  
7 independent claim, is too indefinite. The court took the matter  
8 under submission without a hearing. See Civ LR 7-1(b).

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10 II  
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12 A  
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14 In reviewing a summary judgment motion, the court must  
15 determine whether genuine issues of material fact exist,  
16 resolving any doubt in favor of the party opposing the motion.  
17 "[S]ummary judgment will not lie if the dispute about a material  
18 fact is 'genuine,' that is, if the evidence is such that a  
19 reasonable jury could return a verdict for the nonmoving party."  
20 Anderson v Liberty Lobby, 477 US 242, 248 (1986). "Only  
21 disputes over facts that might affect the outcome of the suit  
22 under the governing law will properly preclude the entry of  
23 summary judgment." Id. And the burden of establishing the  
24 absence of a genuine issue of material fact lies with the moving  
25 party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986).  
Summary judgment is granted only if the moving party is entitled  
to judgment as a matter of law. FRCP 56(c).

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27 The nonmoving party may not simply rely on the  
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1 pleadings, however, but must produce significant probative  
2 evidence supporting its claim that a genuine issue of material  
3 fact exists. TW Elec Serv v Pacific Elec Contractors Ass'n, 809  
4 F2d 626, 630 (9th Cir 1987). The evidence presented by the  
5 nonmoving party "is to be believed, and all justifiable  
6 inferences are to be drawn in his favor." Anderson, 477 US at  
7 255. "[T]he judge's function is not himself to weigh the  
8 evidence and determine the truth of the matter but to determine  
9 whether there is a genuine issue for trial." Id at 249.

10 The issue of indefiniteness is appropriate for summary  
11 judgment. Determining the question of indefiniteness is a  
12 conclusion "'drawn from the court's performance of its duty as  
13 the construer of patent claims \* \* \*.'" Bancorp Services, LLC v  
14 Hartford Life Ins Co, 359 F3d 1367, 1372 (Fed Cir 2004), quoting  
15 Atmel Corp v Info Storage Devices, Inc, 198 F3d 1374, 1378 (Fed  
16 Cir 1999). Like claims construction, the determination whether  
17 a claim is impermissibly indefinite is a legal conclusion. Id;  
18 All Dental Prodx, LLC v Advantage Dental Products, Inc, 309 F3d  
19 774, 778 (Fed Cir 2002); see Honeywell Int'l, Inc v Int'l Trade  
20 Comm'n, 341 F3d 1332, 1338 (Fed Cir 2003). As such,  
21 indefiniteness is a question of law appropriate for resolution  
22 at the summary judgment stage. Mossman v Broderbund Software,  
23 Inc, 1999 US Dist LEXIS 8014, \*19 (ED Mich) (Zatkoff, J.).

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Plumtree contends that the term "aesthetically pleasing" is impermissibly indefinite as a matter of law and thus invalidates the claims in the '137 patent. The Patent Act requires, among other things, that the patent's claims "particularly point[] out and distinctly claim[] the subject matter which the applicant regards as his invention." 35 USC § 112 ¶ 2. "[T]he limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public." Markman v Westview Instruments, Inc., 517 US 370, 390 (1996), quoting General Elec Co v Wabash Appliance Corp, 304 US 364, 369 (1938). This is important because

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[o]therwise, a zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field [internal citation omitted], and the public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights [internal citation omitted].

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Markman, 517 US at 390 (internal quotations omitted).

Accordingly, the § 112 ¶ 2 definiteness requirement "focuses on whether the claims \* \* \* adequately perform their function of notifying the public of the [scope of the] patentee's right to exclude." Honeywell, 341 F3d at 1338, quoting S3 Inc v nVIDIA

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1       Corp, 259 F3d 1364, 1371-72 (Fed Cir 2001).

2              In assessing the definiteness requirement, the court  
3 should determine whether those skilled in the art would  
4 understand what is claimed when the claim is read in light of  
5 the specification. Bancorp, 359 F3d at 1372. This  
6 determination should be made in accordance with "the familiar  
7 canons of claim construction." All Dental Prodx, 309 F3d at  
8 780. This means that the court should primarily evaluate the  
9 language of the claim itself but should also assess the  
10 intrinsic evidence, including the patent specification and  
11 prosecution history. Id; see Elekta Instrument SA v OUR  
12 Scientific Int'l, Inc, 214 F3d 1302, 1307 (Fed Cir 2000).  
13 Although the court may look to extrinsic evidence if necessary  
14 to its understanding of the patent, such evidence in general,  
15 and expert testimony in particular, is disfavored. See Texas  
16 Digital Systems, Inc v Telegenix, Inc, 308 F3d 1193, 1212 (Fed  
17 Cir 2002); Elekta Instrument, 214 F3d at 1307.

18              The court should not hold the claim to be indefinite  
19 simply because "it poses a difficult issue of claim  
20 construction; if the claim is subject to construction, i e, it  
21 is not insolubly ambiguous, it is not invalid for  
22 indefiniteness." Bancorp, 359 F3d at 1372 (citing Honeywell,  
23 341 F3d at 1338-39). Evaluating the indefiniteness question in  
24 this fashion serves to protect the statutory presumption of  
25 patent validity. Bancorp, 359 F3d at 1372 (citing 35 USC §  
26 282); see Honeywell, 341 F3d at 1338-39. When the question of  
27 indefiniteness is close, it should be resolved in favor of the  
28 patentee. Bancorp, 359 F3d at 1372 (citing Exxon Research &

Engineering Co v United States, 265 F3d 1371, 1375 (Fed Cir 2001)).

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The court begins, as it must, with the ordinary and customary meaning of the words "aesthetically pleasing." See Texas Digital, 308 F3d at 1201-02, 1204. "The terms used in the claims bear a heavy presumption that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art." Id at 1202 (internal quotation omitted). The court may turn to a dictionary to aid it in ascertaining the ordinary and customary meaning of the disputed language. Id.

19 Webster's New Collegiate Dictionary defines the word  
20 "aesthetic" as "of, relating to, or dealing with aesthetics or  
21 the beautiful" or "appreciative of, responsive to, or zealous  
22 about the beautiful." Webster's New Collegiate Dictionary at 61  
23 (9th ed 1990). This is similar to the definition from the  
24 American Heritage Dictionary, Fourth Edition, that Plumtree  
25 advances, which defines "aesthetic" as "of or concerning the  
26 appreciation of beauty or good taste" or "characterized by a  
27 heightened sensitivity to beauty." Levin Decl at 3 ¶ 13, Exh L  
28 at 3. Webster's New Collegiate Dictionary defines the word

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1 "pleasing" as "giving pleasure," which is similar to Plumtree's  
2 asserted definition of "giving pleasure or enjoyment."  
3 Webster's New Collegiate Dictionary at 903; Levin Decl at 3 ¶  
4 13, Exh L at 4. Taken together, therefore, the phrase  
5 "aesthetically pleasing" seems to mean "having beauty that gives  
6 pleasure or enjoyment" - in other words, "beautiful." Such a  
7 term seems to the court to be quite subjective.

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11 The court may examine the intrinsic record to  
12 determine whether the patent's specification provides an  
13 explicit definition of the term that clarifies or differs from  
14 its ordinary dictionary meaning. See Texas Digital, 308 F3d at  
15 1204. In the case at bar, the '137 patent's specification  
16 provides little guidance with respect to the meaning of the term  
17 "aesthetically pleasing" and does not seem specifically to  
18 define the term. The patent's Summary of Invention uses the  
19 term or similar terms in several instances. For example, the  
20 patent states:

21 The authoring system enables the user inter-  
22 face for each individual kiosk to be customized  
23 quickly and easily within wide limits of vari-  
24 ation, yet subject to constraints adhering the  
25 resulting interface to good standards of  
aesthetics and user friendliness.

26 Patent at 3:28-32 (emphasis added). The Summary of Invention  
27 further states:

28 [M]ajor aesthetic or functional design choices  
\* \* \* may be built into the system taking into  
account the considered opinions of aesthetic  
design specialists, database specialists, and

1            /  
2 academic studies on public access kiosk systems  
3 and user preferences and problems. Only a  
4 limited range of pre-defined design choices  
5 is then made available to a system author.

4 Id at 3:57-66 (emphasis added). As Plumtree notes, this  
5 language provides no information regarding an objective  
6 definition of "aesthetically pleasing." The language suggests,  
7 however, that "aesthetics" are an important limitation on the  
8 claimed invention and that whether something is aesthetically  
9 pleasing may be subject to different opinions. The  
10 specification, therefore, does not seem to limit the  
11 subjectivity of the term "aesthetically pleasing."

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The court may also examine the patent's prosecution history to determine whether any light may be shed on the definition of the disputed term. All Dental Prodx, 309 F3d at 780; see Texas Digital, 308 F3d at 1204. According to the parties, the patent examiner for the '137 patent never raised any concerns regarding the "aesthetically pleasing" phrase. See Mot Sum J at 12:15-13:2; Opp Mot Sum J at 15:10-11. But the court may also consider the prosecution history of the related '040 patent. See Microsoft Corp v Multi-Tech Systems, Inc, 357 F3d 1340, 1349 (Fed Cir 2004) (noting that "the prosecution history of one patent is relevant to an understanding of the scope of a common term in a second patent stemming from the same parent application"). As noted above in section I(A), the patent examiner for the '040 patent questioned the term

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1 "aesthetically pleasing" as being "highly subjective." See  
2 Levin Decl at 2 ¶ 5, Exh D at 2. Initially, Datamize responded  
3 to the patent examiner's rejection of the language by offering  
4 various justifications for the language, including: (1) the  
5 language was not intended to imply judgment about relative  
6 artistic merits; (2) whether the system author's sense of  
7 aesthetics complies with some other standard of beauty or good  
8 taste is irrelevant; (3) the point of the language is that the  
9 system author can create an "aesthetically pleasing look and  
10 feel" that the system author "desire[s]". See id at 2 ¶ 6, Exh  
11 E at 2. Ultimately, Datamize chose to delete the language from  
12 its application for the '040 patent, stating that the language  
13 was "not intended to identify qualities separate and apart from  
14 the remainder of the claim element" and was "superfluous and  
15 unnecessary to the claims." Id at 2 ¶ 7, Exh F at 1-2. The  
16 prosecution history of the related '040 patent, therefore, does  
17 not provide a more objective means of ascertaining the meaning  
18 of "aesthetically pleasing." In fact, the prosecution history  
19 suggests that the language has little meaning at all.

20 Accordingly, consideration of the relevant factors  
21 suggests that the term "aesthetically pleasing" is impermissibly  
22 indefinite under § 112 ¶ 2.

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26 In addition to the above factors, consideration of and  
27 comparison with relevant case law may prove useful. Plumtree  
28 argues that, when a disputed term is highly subjective, courts

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1 often find that the term is too indefinite to meet the  
2 requirements of § 112 ¶ 2. For example, in Mossman, the  
3 district court concluded that the term "readily follow" was  
4 impermissibly indefinite, in part because the patent in question  
5 did "not mention or even attempt to establish any criteria for  
6 determining whether a display can be 'readily followed'" and  
7 because the term was "not defined and has no particular meaning  
8 in the [] patent claims." Mossman, 1999 US Dist LEXIS 8014 at  
9 \*21. Another case cited by Plumtree is STX, Inc v Brine, Inc,  
10 37 F Supp 2d 740 (D Md 1999) (Davis, J), aff'd 211 F3d 588 (Fed  
11 Cir 2000), in which the defendant challenged the term "improved  
12 handling and playing characteristics" in a patent for a lacrosse  
13 stick. The STX court found the term impermissibly indefinite,  
14 agreeing with the defendant that "this alleged limitation is  
15 subjective on so many levels it is impossible to determine the  
16 scope of [the] term." Id at 755 (internal quotation omitted).  
17 And Plumtree also cites Semmler v American Honda Motor Co, Inc,  
18 990 F Supp 967 (SD Ohio 1997) (Graham, J). The Semmler court  
19 concluded that the term "considerable fuel savings" was  
20 impermissibly indefinite because the word "considerable" was  
21 imprecise and did not reasonably apprise a person skilled in the  
22 art of what was meant. Id at 975. These three cases dealt with  
23 terms that are similar to the term at issue in the case at bar -  
24 all are terms with very subjective ordinary meanings that are  
25 not sufficiently narrowed by the patents in question.

26 Although Datamize does not make much of an attempt to  
27 distinguish these three cases, Datamize argues that the term  
28 "aesthetically pleasing" is more like terms held to be

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1 sufficiently definite in the All Dental Prodx and Bancorp cases.  
2 In All Dental Prodx, the court concluded that the term "original  
3 unidentified mass" was not impermissibly indefinite. All Dental  
4 Prodx, 309 F3d at 780. But the prosecution history and  
5 specification in that case supported the view that the disputed  
6 term meant "a mass that does not have a specific preformed size  
7 and shape." Id. Unlike the "aesthetically pleasing" term in  
8 the present case, the meaning of the disputed term in All Dental  
9 Prodx is objective and is not controlled by individual  
10 subjective impressions. Datamize also relies on Bancorp, in  
11 which the Federal Circuit found the term "surrender value  
12 protected investment credits" to be definite. Bancorp, 359 F3d  
13 at 1372. In so holding, the Bancorp court found that, although  
14 the entire term was not separately defined by the patent, its  
15 component terms were sufficiently well-defined by the patent to  
16 make the meaning of the entire term readily discernable. Id.  
17 Such is not the case in the present action, as the components of  
18 the "aesthetically pleasing" term are subjective and not defined  
19 by the patent.

20 Thus, the court agrees with Plumtree that the case law  
21 supports finding the term impermissibly indefinite.

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25 Although the foregoing would seem to justify ruling  
26 that the "aesthetically pleasing" language renders the '137  
27 patent's claims impermissibly indefinite, the court also  
28 considers the proposed constructions of "aesthetically pleasing"

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1 offered by Datamize in its opposition brief. First, Datamize  
2 appears to contend that "aesthetically pleasing" requirement is  
3 met so long as the authoring tool imposes some constraints or  
4 limitations on predefined screen elements provided by the  
5 system. Opp Mot Sum J at 10:15-18; see also id at 14:10-13  
6 (stating that "[f]or this claim limitation, the only thing that  
7 is important for the purposes of infringement is whether there  
8 are pre-defined limitations or constraints placed on the screen  
9 elements types in conformity with the system developer's overall  
10 design"). But interpreting the language in this fashion is  
11 simply not proper. The patent separately describes the  
12 necessity of such "predefined constraints" in paragraph [b] of  
13 the independent claim. See Patent at 20:50-51, 21:7-8. The  
14 term "aesthetically pleasing" must mean something different from  
15 predefined constraints or limitations. It is a fundamental  
16 principle of patent law that all words in a claim must be given  
17 meaning. Ethicon Endo-Surgery, Inc v United States Surgical  
18 Corp, 93 F3d 1572, 1582 (Fed Cir 1996); see Telemac Cellular  
19 Corp v Topp Telecom, Inc, 247 F3d 1316, 1325 (Fed Cir 2001);  
20 Elekta Instrument, 214 F3d at 1307. And the court is not  
21 permitted to rewrite a claim to preserve its validity. Allen  
22 Engineering Corp v Bartell Indus, Inc, 299 F3d 1336, 1349 (Fed  
23 Cir 2002) (citing Rhine v Casio, Inc, 183 F3d 1342, 1345 (Fed  
24 Cir 1999)). Although Datamize may believe the term is  
25 unnecessary (as evidenced by their deletion of the term in  
26 connection with the '040 patent), the court cannot simply ignore  
27 the term as superfluous and read the term out of the claim.

28 Alternatively, Datamize implies that the "aesthetically

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1 "aesthetically pleasing" term should be evaluated from the perspective of the  
2 system author and that anyone else's perception of the screens  
3 is irrelevant. See Opp Mot Sum J at 13:3-5; 14:7-9. This is  
4 the interpretation of the claim that Datamize has evidently  
5 advanced in the claims construction prehearing statement  
6 submitted pursuant to Pat LR 4-3. See Supp Levin Decl at 2 ¶ 6,  
7 Exh Q at 6. But this construction also does not save the term  
8 from indefiniteness. For one thing, the plain language of the  
9 claims does not support such a construction. Nowhere in the  
10 claim does the patent limit the "aesthetically pleasing" term to  
11 evaluation by the system author. Cf Patent at 20:37-21:23. Nor  
12 does there appear to be any language in the patent specification  
13 that would link the "aesthetically pleasing" requirement with  
14 the system author. Cf id at 3:28-32, 3:57-66. Datamize points  
15 out that the specification states in part that

16 major aesthetic or functional design choices  
17 \* \* \* may be built into the system taking into  
18 account the considered opinions of aesthetic  
19 design specialists, database specialists, and  
academic studies on public access kiosk systems  
and user preferences and problems. Only a limited  
range of pre-defined design choices is then made  
available to a system author.

20 Id at 3:57-66. But this language does not link aesthetics with  
21 the preferences of the system author. In fact, it seems to  
22 support a different notion - that the aesthetic choices are  
23 determined in accordance with the opinions of "aesthetic design  
24 specialists." The language of the patent simply does not  
25 support the construction Datamize advances - surely if the  
26 screens were meant only to be "aesthetically pleasing" to the  
27 system author, the patent could have so stated.  
28

Moreover, the court would be hard-pressed to construe a patent term so that it would turn on the subjective beliefs of those individuals who will use the authoring tool. Limiting the arbiters of aesthetics to that group of persons does not change the fact that the meaning of the term is still subjective and cannot be determined by the term's ordinary meaning or anything in the patent or its prosecution history. Without some objective criteria for what a system author would consider "aesthetically pleasing," a person skilled in the art would be unable to evaluate whether his own invention avoided infringing the '137 patent.

12               The court thus rejects the claim constructions that  
13 Datamize appears to advance for the term "aesthetically  
14 pleasing."

Datamize seeks to remedy the ambiguous nature of the "aesthetically pleasing" term by offering the expert testimony of Jeremy Rosenblatt, whose expertise is in computer systems and authoring systems. See Opp Mot Sum J at 18:9-18. Mr Rosenblatt testifies that he believes the claims of the '137 patent to be neither indefinite nor ambiguous. Decl Jeremy Rosenblatt (Rosenblatt Decl; Doc # 60, Atch 1) at 1 ¶ 2. Rosenblatt in part relies upon a scientific paper published in 2000 regarding objective measures for interface aesthetics. Id at 7 ¶ 19. Rosenblatt testifies that the term "aesthetically pleasing" is measured from the perspective of the system author and, even

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1 were it measured from the perspective of the system's end-users,  
2 the term is sufficiently clear to one of ordinary skill in the  
3 art. Id at 8 ¶¶ 21, 22.

4 There are several problems with relying upon the  
5 Rosenblatt declaration. First, as noted earlier, expert  
6 testimony is disfavored and should not be used to "vary or  
7 contradict" the language of the claim. Texas Digital, 308 F3d  
8 at 1212; see Honeywell, 341 F3d at 1339. And, even assuming  
9 that expert opinion is admissible, Rosenblatt seems to have  
10 admitted in deposition testimony that no objective measure of  
11 aesthetics is disclosed in the patent itself or any of the  
12 references cited. See Depo Jeremy Rosenblatt (Rosenblatt Depo;  
13 Supp Decl Michael B Levin (Supp Levin Decl; Doc # 65) at 1 ¶ 2)  
14 at 51:8-14, 53:2-5, 94:20-25, 108:21-25, 123:25-124:13.

15 Second, Rosenblatt relies primarily on an article  
16 published in 2000, several years after the application for the  
17 '137 patent was filed. As Plumtree points out, claim language  
18 ought not to be defined by standards formulated after the  
19 patent's application was filed. The court ought to "consider  
20 the meaning of the claim as of the date the invention was  
21 constructively reduced to practice - the date the patent  
22 application was filed." Kopykake Enterprises, Inc v Lucks Co,  
23 264 F3d 1377, 1383 (Fed Cir 2001). "[W]hen a claim term  
24 understood to have a narrow meaning when the application is  
25 filed later acquires a broader definition, the literal scope of  
26 the term is limited to what it was understood to mean at the  
27 time of the filing." Id. Interestingly, the 2000 article upon  
28 which Rosenblatt relies concedes that "[n]o one knows how to

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1 measure aesthetic value" and "[s]ome [] doubt that it can be  
2 measured." Supp Levin Decl at 2 ¶ 3, Exh N at 4. The court  
3 therefore finds that Datamize's expert testimony does little to  
4 provide the court with an acceptable or definite meaning for the  
5 term "aesthetically pleasing."

6 Because the court is unable to construe the term in a  
7 way that is supported by the term's ordinary meaning, by the  
8 intrinsic evidence or even by the extrinsic evidence, the court  
9 must find that "aesthetically pleasing" is hopelessly  
10 indefinite. Accordingly, the court GRANTS Plumtree's motion for  
11 summary judgment of invalidity (Doc # 51).

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13 III  
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15 For the foregoing reasons, the court GRANTS Plumtree's  
16 motion for summary judgment on the issue of indefiniteness (Doc  
17 # 51). Because the court's judgment appears to invalidate each  
18 claim of the '137 patent, plaintiff is entitled to summary  
19 judgment of invalidity of the '137 patent. Given that this both  
20 resolves Plumtree's declaratory action and undermines Datamize's  
21 claim of infringement, this order appears conclusively to  
22 dispose of this case. Accordingly, the court VACATES all

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1 currently scheduled dates in this matter and directs the clerk  
2 to close the file and terminate all pending motions.

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4 **IT IS SO ORDERED.**

5 \_\_\_\_\_/s/\_\_\_\_\_

6 VAUGHN R WALKER

7 United States District Judge

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